

The Honorable Barbara J. Rothstein

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA**

Plaintiff,

vs.

**STATE FARM LIFE INSURANCE
COMPANY,**

Defendant.

PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

ORAL ARGUMENT REQUESTED

Plaintiff William T. Whitman (“Mr. Whitman” or “Plaintiff”) individually, and on behalf of proposed Class of Washington policy owners, challenges Defendant State Farm Life Insurance Company’s (“State Farm” or “Defendant”) interpretation and implementation of its form universal insurance policy—“Form 94030.” This case is well-suited for class certification because it turns interpretation of a form contract under Washington law, and State Farm’s uniform conduct all class members. In fact, two nearly identical cases brought against State Farm on behalf of Missouri and California policy owners of the same policy form have been certified in the last few years. The case involving Missouri Form 94030 owners was tried to jury verdict in 2018, *Vogt v. State Farm Life Ins. Co.*, 16-4170-CV-C-NKL (W.D. Mo.) (“*Vogt*”), and affirmed on

1 appeal, *see* 963 F.3d 753 (8th Cir. 2020). The case involving California Form 94030 owners is set
 2 for a class trial in May 2021, *see Bally v. State Farm Life Ins. Co.*, 18-cv-04954-CRB (N.D. Cal.)
 3 (“*Bally*”). The same result is warranted here.¹

4 State Farm’s Form 94030 life insurance policy (the “Policy”) is a “universal” life insurance
 5 contract. Unlike standard “term” life insurance, universal life insurance is designed to provide a
 6 lifetime death benefit to the insured plus an investment feature or savings component, called the
 7 “Account Value,” that allows policy owners to earn interest on their accumulated premiums over
 8 time. The Policy provides for certain charges to be deducted, including a premium expense charge,
 9 taken by State Farm from each premium before the remainder of the premium is deposited into the
 10 policy owner’s Account Value, as well as a “Monthly Deduction” taken from the Account Value
 11 each month.

12 The Policy provides that the Monthly Deduction includes a cost of insurance charge (the
 13 “COI charge”) and an expense charge (the “Expense charge”). As alleged in Plaintiff’s Second
 14 Amended Complaint (“Complaint” or “Compl.”), State Farm determines these charges in a manner
 15 not permitted by the plain terms of the Policy. Specifically, the Policy requires that State Farm
 16 calculate the COI charge component of the Monthly Deduction using cost of insurance rates (“COI
 17 rates”). State Farm promises its COI rates “for each policy year are based on the Insured’s age on
 18 the policy anniversary, sex, and applicable rate class,” and “can be adjusted for projected changes in
 19 mortality.” Policy year, age, sex, and rate class are factors associated with assessing an insured’s
 20 mortality risk (i.e., the risk the insured will die). But State Farm does not base its COI rates on those
 21 mortality factors identified in the Policy. Instead, State Farm loads its COI rates and corresponding
 22

23 ¹ For this reason, Plaintiff’s motion affirmatively addresses the arguments that State Farm raised and that were rejected
 in *Vogt* and *Bally* (and that Plaintiff expects State Farm will raise here) with the goal of providing the Court context to
 these previously litigated and resolved issues.

1 COI charges with unlisted, non-mortality factors, including expenses and profit, in repeated breach
 2 of the Policy. This case presents a predominating, common question of liability, the answer to which
 3 will resolve thousands of claims: whether State Farm breached the Policy by taking funds from
 4 policy owners without authorization under the Policy's relevant terms.

5 Like liability, damages can be readily determined on a class-wide basis by calculating the
 6 lost Account Value (with interest at the applicable policy rate) for each policy owner resulting from
 7 the COI overcharges. The excess deductions are calculated using the same formula for every class
 8 member—simply by subtracting the non-mortality component attributable to State Farm's use of
 9 impermissible factors in determining COI rates. By way of example, by loading its COI rates with
 10 unlisted factors at pricing and repricing, State Farm deprived Mr. Whitman of \$5,566.82 in Account
 11 Value due to the excessive deductions. These amounts can be similarly and systematically calculated
 12 for each class member and aggregated for the entire Class, as Plaintiff's expert, Scott Witt, did for
 13 the Missouri and California classes in *Vogt* and *Bally*, and which he has so calculated for the putative
 14 Washington class.

15 STATEMENT OF FACTS

16 I. The Life Insurance Contracts Between State Farm and the Class.

17 State Farm began issuing Form 94030 universal life insurance policies in Washington in
 18 January 1994. Declaration of Scott J. Witt ("Witt Dec."), ¶ 19, Ex. I (Holzbauer Dep.), 142:10-20.
 19 Mr. Whitman purchased his Form 94030 Policy in Tacoma, Washington in 2001. *See* application
 20 attached to the Policy.² Although existing policies remain in force, State Farm ceased issuing new
 21 Form 94030 policies in Washington in 2004. Witt Dec., ¶ 19.

22 The Policy is a valid and enforceable contract between each policy owner and State Farm.
 23

² Plaintiff's Policy is attached as Ex. B to the Declaration of Mr. Witt.

Dkt. 38 (Compl.), ¶ 13. Its terms are not subject to individual negotiation and are materially the same for all policy owners, and the Policy cannot be altered by the agent's representations at the time of sale, or by any other discussions or writings. Policy at 11 ("The [P]olicy is the entire contract," and it consists of "the Basic Plan, any amendments, endorsements, and riders, and a copy of the application."). State Farm's obligations (like the policy owner's) cannot be obviated by informal consent, waiver, or some other act because "[o]nly an officer has the right to change this [P]olicy. No agent has the authority to change the [P]olicy or to waive any of its terms." *Id.*

The Policy is a "universal" life insurance policy. In contrast to term life insurance, which provides only a death benefit, the Policy includes an Account Value where, after deduction of a premium expense charge, premiums are deposited and accumulate interest at a fixed rate of no less than four percent (4%), much like a savings account. *Id.*; *see* Witt Dec., ¶ 17.

II. The Policy Identifies Specific Charges State Farm Is Authorized to Deduct from Account Values.

The Policy authorizes State Farm to take from the Policy's Account Value a Monthly Deduction comprised of the separately identified: (a) COI charge; (b) charges for any riders; and (c) \$5.00 Expense charge. Policy at 9.

A. The COI charge is a mortality charge.

The Policy provides that the COI charge is determined by multiplying the COI rate by the Policy's net amount at risk (the amount by which the death benefit amount exceeds the Account Value; in other words, the net amount State Farm will have to pay the beneficiary if the insured dies). Witt Dec., ¶ 26; Policy at 10. The Policy then states that COI rates "*for each policy year are based on the Insured's age on the policy anniversary, sex, and applicable rate class,*" and that "*[s]uch rates can be adjusted for projected changes in mortality.*" *Id.* (emphasis added). The factors identified in the Policy are characteristics commonly understood and used within the life insurance

1 industry to determine the mortality expectations for an insured. Witt Dec., ¶ 30; *id.*, Ex. F (Phipps
 2 Tr.), 24:24-25:9; *id.*, Ex. E (Streily Tr.), 155:19-158:22, 159:6-160:20, 196:6-197:23; *see also Vogt*,
 3 2018 WL 1747336, at *2 (W.D. Mo. Apr. 10, 2018) (recognizing that age, sex, and rating class are
 4 mortality factors); *Alleman v. State Farm Life Ins. Co.*, 334 F. App'x 470, 472 (3d Cir. 2009) (noting
 5 that age and sex are mortality factors); *In re Conseco Life Ins. Co. Life Trend Ins. Mktg. & Sales*
 6 *Practice Litig.*, 920 F. Supp. 2d 1050, 1061 (N.D. Cal. 2013), *vacated pursuant to settlement*, 2013
 7 WL 10349975 (N.D. Cal. Nov. 8, 2013) (“Because age and sex are the guiding factors in the lifespan
 8 of a person, a layperson would ordinarily attach the rates to mortality.”). State Farm does not disclose
 9 to policyholders the actual COI rates or factors included therein. Witt Dec., Ex. I (Holzbauer Tr.),
 10 178:21-25; *id.*, Ex. E (Streily Tr.), 124:13-23; *id.*, Ex. C (annual statements); *id.*, Ex. D (Policy
 11 illustration); *see also Bally*, 335 F.R.D. 288, 304 (N.D. Cal. 2020) (granting certification of a
 12 California class, stating “State Farm does not adduce any evidence to show that ‘policyholder[s]’
 13 would have been on notice that State Farm was considering unlisted variables in calculation [of] the
 14 COI”) (citing *Vogt*, 2018 WL 1955425, at *6 \ (“[T]here is nothing to indicate that individual
 15 statute-of-limitations issues would predominate so as to make class certification impractical or
 16 inappropriate.”)).

17 The Policy separately authorizes State Farm to deduct a 5% premium expense charge from
 18 each premium paid as well as a fixed monthly Expense charge of \$5.00. Policy at 3.

19 **B. State Farm increases COI charges with undisclosed loads.**

20 Mr. Whitman contends the Policy provision requiring that monthly COI rates “for each
 21 policy year” be “based on the Insured’s age on the Policy anniversary, sex, and applicable rate class”
 22 means exactly what it says: that State Farm must determine COI rates using only the listed factors,
 23 not undisclosed factors to increase the COI rates. The *Vogt* court agreed with Plaintiff’s

1 interpretation of the Policy, and that interpretation was affirmed on appeal by the Eighth Circuit. *See*
 2 *Vogt v. State Farm Life Ins. Co.*, 963 F.3d 753, 763-64 (8th Cir. 2020). Similarly, the *Bally* court
 3 concluded the Policy was ambiguous and thus construed the ambiguity in favor of the insured. *See*
 4 2019 WL 3891149, at *8.

5 State Farm can and did develop rates using only the listed factors when it priced the Policy;
 6 they are known as the “pricing mortality” rates. *See* Witt Dec., ¶¶ 30, 32; *id.*, Ex. E (Streily Tr.),
 7 151:23-152:15, 160:15-20; *id.*, Ex. I (Holzbauer Tr.), 145:15-19. But, after developing these pricing
 8 mortality rates using only the listed factors, State Farm increased those rates with undisclosed profit
 9 and expense loads. *See Vogt*, Dkt. 335; Witt Dec., Ex. G (New Jersey Actuarial Memorandum) at 5;
 10 *id.*, Ex. E (Streily Tr.), 144:20-24; 224:6-18 (admitting that “pricing mortality . . . was used to
 11 determine a cost of insurance rate, and that the cost of insurance rate was then loaded for expenses
 12 and profit,” and that “expenses and profit” are not considered “to be mortality related”); *see also*
 13 Witt Dec., ¶¶ 41-45. Inclusion of these undisclosed factors has a substantial impact on the amounts
 14 deducted each month from policy owners’ Account Values. On the same policy form and identical
 15 pricing process (*see* Witt Dec., ¶ 33), a jury found State Farm’s overcharges caused over \$34 million
 16 in lost Account Value for a class of approximately 24,000 Missouri policy owners, *see Vogt*, Dkt.
 17 358, and in *Bally*, Mr. Witt has calculated total lost Account Value in excess of \$120 million for the
 18 class of over 82,000 California policy owners.

19 In this case, the loading of the COI rates was similarly substantial. For instance, in the first
 20 ten years after Mr. Whitman purchased his Policy, State Farm charged him COI rates nearly double
 21 the rates determined using only the listed, contractual mortality factors. In other words, COI charges
 22 calculated using the contractual COI rates would have been approximately half of the COI charges
 23 that State Farm actually deducted, meaning Mr. Whitman’s actual charges contained significant

1 undisclosed loads. *See* Witt Dec., ¶48. Over the life of Mr. Whitman's Policy, his COI charges were,
 2 on average, in excess of 140% of what they would have been if State Farm had not included
 3 undisclosed factors in the COI rates. *See id.*

4 Because these Policy overcharges result from State Farm's uniform administration of the
 5 Policy, all policy owners are subject to the same set of loaded COI rates. *See* Witt Dec., ¶ 33; *id.*,
 6 Ex. E (Streily Tr.), 140:3-145:10, 146:17-147:5, 171:21-172:11.

7 **ARGUMENT**

8 Plaintiff has brought claims for breach of contract (Count I – Cost of Insurance Charge and
 9 Count II – Expense Charge), conversion (Count III), violation of the Washington Consumer
 10 Protection Act (Count IV), and declaratory and injunctive relief (Count V) (Dkt. 38). Plaintiff now
 11 moves for an order certifying the following class (“the Class”):

12 All persons who own or owned a universal life insurance policy issued by State Farm on
 13 Form 94030 in the State of Washington whose policy was in-force on or after January 1,
 2002 and who was subject to at least one monthly deduction.³

14 Three courts have already found that class certification is appropriate in nearly identical
 15 cases. The Western District of Missouri in *Vogt* certified a class of Missouri policy owners making
 16 the same allegations on the Form 94030 policy, and the Eighth Circuit affirmed class certification
 17 on appeal. *Vogt*, 2018 WL 1955425, at *6, *aff'd* 963 F.3d 753, 766-68 (8th Cir. 2020). The Northern
 18 District of California in *Bally* likewise certified a class of California policy owners making the same
 19 allegations on the Form 94030 policy as are asserted here, and State Farm's Rule 23(f) petition for
 20
 21
 22

23 ³ Excluded from the Class are: State Farm; any entity in which State Farm has a controlling interest; any of the officers,
 directors, or employees of State Farm; the legal representatives, heirs, successors, and assigns of State Farm; anyone
 employed with Plaintiff's counsel's firms; any Judge to whom this case is assigned, and his or her immediate family;
 and policies that insured males with an issue age of zero and terminated in the first policy year.

1 permission to appeal was denied. *Bally*, 335 F.R.D. at 305, *Rule 23(f) appeal denied*, No. 20-80070
 2 (9th Cir. July 22, 2020).

3 Moreover, courts frequently certify class actions, like this one, alleging breaches of the cost
 4 of insurance provisions of standardized life insurance policies. *See, e.g., Spegele v. USAA Life Ins.*
 5 *Co.*, 336 F.R.D. 537 (W.D. Tex. 2020) (“*USAA COP*”); *Feller v. Transamerica Life Ins. Co.*, No. 16-
 6 cv-01378, 2017 WL 6496803 (C.D. Cal. Dec. 11, 2017) (“*Transamerica COP*”); *In re Conseco Life*
 7 *Ins. Co. LifeTrend Ins. Sales & Mktg. Litig.*, 270 F.R.D. 521, 533 (N.D. Cal. 2010); *In re Conseco*
 8 *Life Ins. Co. Cost of Ins. Litig.*, No. ML 04-1610, 2005 WL 5678842, at *4, *9 (C.D. Cal. Apr. 26,
 9 2005); *Larson v. John Hancock Life Ins. Co.*, No. RG16813803, 2017 WL 4284163 (Cal. Super. Ct.
 10 March 23, 2017) (“*John Hancock COP*”); *Fleisher v. Phoenix Life Ins. Co.*, No. 11-cv-8405, 2013
 11 WL 12224042, at *13, *18 (S.D.N.Y. July 12, 2013) (“*Phoenix COP*”); *Hanks v. Lincoln Life &*
 12 *Annuity Company of New York*, 330 F.R.D. 374 (S.D.N.Y. 2019) (“*Lincoln Life COP*”); *Lee v.*
 13 *Allstate Life Ins. Co.*, 361 Ill. App. 3d 970 (Ill. Ct. App. 2005). Class certification here is likewise
 14 proper.

15 **III. Standard on Class Certification.**

16 “A party seeking to litigate a claim as a class representative must affirmatively satisfy the
 17 requirements of Federal Rule of Civil Procedure 23(a) and the requirements of at least one of the
 18 categories under Federal Rule of Civil Procedure 23(b).” *Rosas v. Sarbanand Farms, LLC*, 329
 19 F.R.D. 671, 682 (W.D. Wash. 2018) (citing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 345
 20 (2011); *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 588 (9th Cir. 2012)). The Court conducts a
 21 “rigorous analysis” in determining whether these requirements are met, but “must not decide the
 22 merits of a factual or legal dispute” unless those merits overlap with the Rule 23 requirements. *Id.*
 23 “The ultimate decision to certify a class is within the Court’s discretion.” *Id.*

1 In this case, the proposed Class meets all the requirements of Rule 23(a) as well as the
 2 requirements of Rule 23(b)(2) and (b)(3).

3 **IV. The Class Meets Each of the Requirements of Rule 23(a).**

4 Rule 23(a) states the following class certification requirements: “(1) the class is so numerous
 5 that joinder is impracticable; (2) there are questions of law or fact common to the class; (3) the claims
 6 or defenses of representative parties are typical of those of the class; and (4) the representatives will
 7 fairly and adequately protect the interests of the absent class members.” *Rosas*, 329 F.R.D. at 682
 8 (citing Fed. R. Civ. P. 23(a); *Mazza*, 666 F.3d at 588 (“Rule 23(a) requires that plaintiffs demonstrate
 9 numerosity, commonality, typicality and adequacy of representation in order to maintain a class
 10 action.”)).

11 **A. Numerosity is satisfied.**

12 Rule 23(a)’s numerosity requirement is satisfied when the proposed class is sufficiently
 13 numerous to make joinder of all members impracticable. Fed. R. Civ. P. 23(a)(1). “A numerosity
 14 determination requires an examination of the specific facts of each case, though ‘[i]n general, courts
 15 find the numerosity requirement satisfied when a class includes at least 40 members.’” *Rosas*, 329
 16 F.R.D. at 683 (quoting *Rannis v. Recchia*, 380 F. App’x 646, 651 (9th Cir. 2010)).

17 The proposed Class is sufficiently numerous. State Farm’s records show there are over
 18 11,000 members in the proposed Class. Witt Dec., ¶ 20.

19 **B. There are common questions of law and fact.**

20 Under Rule 23(a)(2), Plaintiff “must demonstrate that the ‘class members’ claims ‘depend
 21 upon a common contention’ such that ‘determination of its truth or falsity will resolve an issue that
 22 is central to the validity of each claim in one stroke.’” *Rosas*, 329 F.R.D. at 683 (quoting *Mazza*, 666
 23 F.3d at 588; *Wal-Mart Stores*, 564 U.S. at 345). “Every question of law or fact need not be common

1 to the class.” *Id.* (citing *Abdullah v. U.S. Sec. Assocs., Inc.*, 731 F.3d 952, 957 (9th Cir. 2013)).
 2 “Rather, all Rule 23(a)(2) requires is ‘a single significant question of law or fact.’” *Id.* (quoting
 3 *Abdullah*, 731 F.3d at 957).

4 State Farm made and continues to make excessive deductions for COI charges. Plaintiff
 5 asserts that State Farm has determined COI rates in a manner not authorized by the Policy, and the
 6 resulting deductions from Account Values exceed the amounts permitted by the Policy’s terms.
 7 Common evidence of State Farm’s uniform methodology of calculating deductions on a common
 8 form Policy will establish whether State Farm is liable for breach of contract as a result of its failure
 9 to determine COI rates using only the listed mortality factors and inflation of the COI charges
 10 deducted from policy owners’ Account Values with undisclosed loads (Count I). Likewise, common
 11 evidence will determine whether State Farm is deducting undisclosed expenses through the COI
 12 charge, whether the Policy limits the amount of expenses State Farm is permitted to deduct on a
 13 monthly basis to the fixed amount of the Expense charge, and whether State Farm is therefore in
 14 breach of its contracts with policy owners (Count II). And common evidence will determine whether
 15 State Farm converted policy owners’ property by taking more of their money than authorized (Count
 16 III). Finally, common evidence will determine whether State Farm’s conduct of loading COI rates
 17 with undisclosed factors is unfair and deceptive, occurs in trade or commerce, impacts the public
 18 interest, and whether State Farm’s omission of the fact that it includes such loads caused injury to
 19 each class member, such that it has violated the Washington CPA (Count IV).

20 Each claim depends on a common course of conduct—State Farm entered into identical
 21 contracts and uniformly loaded undisclosed factors into its COI rates for all policy owners. *See Vogt*,
 22 2018 WL 1955425, at *3 (finding commonality satisfied because plaintiff’s claims all turned on
 23 interpretation of the standard form policy and State Farm’s uniform incorporation of non-mortality

1 factors into its COI rates); *Bally*, 335 F.R.D. at 301-02 (finding commonality satisfied, rejecting
 2 State Farm's argument that individualized sales presentations prior to each class member's purchase
 3 of the Policy would result in different policy interpretations of each class member's standard form
 4 policy); *USAA COI*, 336 F.R.D. at 552 (finding commonality satisfied because "whether Defendant
 5 used factors outside those enumerated in the Class Policies to determine its COI Rates will rely on
 6 the same evidence throughout the class"); *Yue v. Conseco Life Ins. Co.*, 282 F.R.D. 469, 476 (C.D.
 7 Cal. 2012) (whether uniform, standard language contained in all insurance policies permitted
 8 insurer's adjustment of COI rates was a common question); *Transamerica COI*, 2017 WL 6496803,
 9 at *6 ("the issue of breach . . . is also common to all prospective class members"); *Phoenix COI*,
 10 2013 WL 12224042, at *8 ("[B]reach of contract *is* the central issue in the case brought by [plaintiff]
 11 on behalf of the [] Class . . .") (emphasis in original); *John Hancock COI*, 2017 WL 4284163, at
 12 *6 (finding that "liability issues are exclusively common issues uniting the class"); *Lincoln Life COI*,
 13 330 F.R.D. at 380 (finding commonality met where claims "turn on common contentions of what
 14 factors . . . Lincoln Life used to calculate the . . . COI rate increase and whether insurance contracts
 15 allow for a rate increase based on those factors").

16 So, for every putative class member, there are many common questions of law, including:

17 • Is State Farm limited to using only the listed mortality factors when setting COI rates?
 18 • Is State Farm permitted to deduct more in expenses than provided by the Policy's
 19 Expense charge?
 20 • Is State Farm liable for conversion?
 21 • Is State Farm's inclusion of undisclosed loads in COI rates an unfair or deceptive trade
 22 practice?

1 Moreover, proving this case is dependent on similarly common questions of fact because
 2 State Farm calculated and took its deductions in the same manner for all policy owners:

- 3 • Did State Farm use factors not specified in the Policy to determine its COI rates?
- 4 • Did State Farm take more money from policy owners' Account Values than it was
 5 authorized to take?

6 Each of the foregoing questions is common to each policy owner and will be answered the
 7 same, one way or the other, for each member of the Class because State Farm's conduct was
 8 consistent as to all policy owners. *See* Witt Dec., ¶ 33, *id.*, Ex. E (Streily Tr.), 166:7-22, 171:21-
 9 172:11.

10 **C. Plaintiff's claims are typical of those of the Class.**

11 The typicality requirement is satisfied when the claims or defenses of the representative party
 12 are typical of those of the class. Rule 23(a)(3). "The test of typicality 'is whether other members
 13 have the same or similar injury, whether the action is based on conduct which is not unique to the
 14 named plaintiffs, and whether other class members have been injured by the same course of
 15 conduct.'" *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 984 (9th Cir. 2011) (quoting *Hanon v.*
 16 *Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992)). "The commonality and typicality inquiries
 17 'tend to merge' and both serve as 'guideposts for determining whether under the particular
 18 circumstances[,] maintenance of a class action is economical and whether the named plaintiff's claim
 19 and the class claims are so interrelated that the interests of the class members will be fairly and
 20 adequately protected in their absence.'" *Rosas*, 329 F.R.D. at 686 (quoting *Wal-Mart Stores*, 564
 21 U.S. at 349 n.5). "Ultimately, representatives' class claims are typical if they are 'reasonably co-
 22 extensive with those of absent class members; they need not be substantially identical.'" *Id.* (quoting
 23 *Hanlon*, 150 F.3d at 1020).

1 The typicality requirement is easily satisfied here. All putative class members were subject
 2 to identical policy language, State Farm performed (and breached) the Policy in the same way for
 3 each class member, and each putative class member was injured in the same way by that conduct.
 4 *See Vogt*, 2018 WL 1955425, at *5 (finding plaintiff's claims typical of those of the class because
 5 the claims arose from and related to the interpretation and application of the policy and the policy
 6 language, and State Farm's methodology for determining COI rates was uniform for all class
 7 members); *Bally*, 335 F.R.D. at 302 (same); *USAA COI*, 336 F.R.D. at 552 (finding typicality
 8 satisfied because "Plaintiff's Policy and the Class Policies are materially identical, and Defendant's
 9 alleged breach of these policies was uniform for both Plaintiff and the proposed class."); *John*
 10 *Hancock COI*, 2017 WL 4284163, at *10 (certifying class of policy owners because the plaintiff's
 11 claims were "typical, indeed, substantially identical, to those of the class" because the plaintiff and
 12 the class agreed to the same policy language); *Lincoln Life COI*, 330 F.R.D. at 380-81; *Transamerica*
 13 *COI*, 2017 WL 6496803, at *8.

14 **D. Plaintiff satisfies the adequacy requirement.**

15 Adequacy requires that the class representative and class counsel "fairly and adequately
 16 protect the interests of the class." Rule 23(a)(4). "To determine whether the representative parties
 17 will adequately represent a class, the Court must examine whether the named Plaintiffs and their
 18 counsel (1) have any conflicts of interest with other class members and (2) will prosecute the action
 19 vigorously on behalf of the class." *Rosas*, 329 F.R.D. at 687 (citing *Ellis*, 657 F.3d at 985). Plaintiff
 20 satisfies the adequacy requirement.

21 First, Plaintiff's claims are consistent with those of the Class. He claims he was overcharged
 22 because State Farm failed to keep its promises in the Policy and to act within its authority in making
 23 deductions from his Account Value. Because the terms of the Policy are the same for everyone and

1 State Farm priced it uniformly, if State Farm used unauthorized factors to increase COI rates,
 2 Plaintiff and all other policy owners suffered excessive COI charges.

3 *Second*, Plaintiff has sufficient interest in the case to ensure vigorous representation. He has
 4 a personal monetary interest in recouping the overcharges. Indeed, Plaintiff's expert's analysis is
 5 that Plaintiff was harmed in the amount of \$5,566.82 (the total lost Account Value resulting from
 6 wrongful COI deductions). Witt Dec., ¶ 59.

7 *Third*, Plaintiff has hired competent, experienced, and qualified counsel with expertise in
 8 class actions and cost of insurance cases, who have and will continue to prosecute the class claims
 9 vigorously. Norman E. Siegel and the attorneys at Stueve Siegel have significant experience in
 10 prosecuting class litigation, including several COI cases. The firm has tried class-action lawsuits to
 11 successful verdicts and has achieved significant monetary settlements for class members. In June
 12 2018, Stueve Siegel and Miller Schirger successfully tried the *Vogt* case, a class action on the same
 13 Form 94030 policy at issue here, securing a jury verdict of \$34,333,495.81 for Missouri policy
 14 owners. *See Vogt*, Dkt. 358 & 360. Moreover, Stueve Siegel and Miller Schirger have successfully
 15 secured settlements on behalf of policy owners in similar cases against Lincoln National Life
 16 Insurance Company, *see Lincoln Nat'l Life Ins. Co. v. Bezich*, No. 02C01-0906-PL-73 (Allen Co.,
 17 Ind.), and John Hancock Life Insurance Company, *see John Hancock COI*, Case No. RG16 813803
 18 (Alameda Co., Cal.).

19 Mr. Siegel and other lawyers in his firm have been appointed as class counsel in dozens of
 20 class actions throughout the country. *See Siegel Dec., Ex. A* (Stueve Siegel firm resume). Likewise,
 21 Miller Schirger has significant experience handling complex insurance contract disputes and brings
 22 needed experience in that area to the case. *See Schirger Dec.* In addition, the lawyers at the law firms
 23 Tousley Brain Stephens, Barrack Rodos & Bacine, and Sarraf Gentile LLP, also representing

1 Plaintiff and the putative class here, bring substantial experience and class action expertise to this
 2 case. *See Stephens Dec.; Bassar Dec.; Sarraf Dec.*

3 *Fourth*, as explained below, there are no conflicts among the class representative, the
 4 proposed class, or class counsel.

5 **1. That State Farm's actual COI rates are, at rare times, lower than its
 6 mortality rates does not create an intra-class conflict.**

7 Plaintiff anticipates that State Farm will reassert its arguments made in *Vogt* and *Bally* that
 8 there is an intra-class conflict because some class members would be worse off if State Farm charged
 9 mortality-only rates. In *Vogt* and *Bally*, Mr. Witt's class-wide damages model revealed *some* months
 10 for *some* class members who had held their policies for many years where State Farm's actual COI
 11 rates were lower than what would have been charged if State Farm has used the contractual,
 12 mortality-only rates. The parties referred to this event as the "cross-over" because State Farm's
 13 mortality-only rates crossed-over (became higher than) its charged COI rates. Although Plaintiff
 14 disputes that State Farm is entitled to an offset for this so-called cross-over credit, this merits
 15 question need not be resolved now.⁴ There is no risk, however, that this issue will create an intra-
 16 class conflict.

17 In *Vogt*, State Farm argued to the jury that it should get an offset against damages for those
 18 months where State Farm charged some policy owners less than it was permitted to under the Policy.
 19

20 ⁴ In *Vogt*, the plaintiff argued that this issue should not be submitted to the jury because State Farm had shown no legal
 21 basis to recover "undercharges" from its policy owners. In particular, the plaintiff argued that State Farm's decision to
 22 *not* breach the Policy in certain months could not serve as the basis for assessing belated charges against policy owners,
 23 especially where State Farm had not identified any provision of the Policy that would allow it to retroactively recover
 amounts it could have but did not charge policy owners through the COI charge, or that would allow it to make larger
 COI deductions in one month because it made lower COI deductions in another month. *See Ex. 1 (Vogt, Dkt. 265*
 (Plaintiff's Motion in Limine)) at 8-9. Likewise, in *Bally*, the plaintiff moved for summary judgment on State Farm's
 offset defense premised on the cross-over for the same reasons, which is currently pending. *See Bally, Dkt. 142 at ECF*
 pages 23-24.

1 The jury agreed with State Farm and awarded damages that included an offset.⁵ Giving State Farm
 2 this cross-over offset lowered total damages to the class by less than 3%. *See* Ex. 2 (Transcript of
 3 *Vogt* Trial, hereafter “*Vogt* Trial Tr.”), 132:21-23, 135:17-137:7, 139:19-140:3. After applying the
 4 credit, a mere 29 (out of the nearly 24,000) class members were determined to have suffered no net
 5 loss, and received a judgment of \$0. *See Vogt*, Dkt. 377-3 (*Vogt* Trial Ex. 242); Ex. 2 (*Vogt* Trial
 6 Tr.), 417:12-15. Similarly, in *Bally*, Mr. Witt determined that if State Farm were awarded an offset
 7 in that case, only 121 out of 82,581 class members would suffer no net loss, reducing total damages
 8 to the class by only 3.76%. *See* Ex. 3 (Witt Trial Report in *Bally*), ¶¶ 10 (d)-(e), ¶ 55 n.12. These
 9 results in *Vogt* and *Bally* illustrate two things: 1) the incidence of State Farm undercharging class
 10 members is extremely rare and has a minimal impact on the damages class members have suffered,
 11 and 2) no class member could be made worse off by the litigation. For example, the 29 individuals
 12 who did not suffer a net overcharge in *Vogt* because the “cross-over credit” fully offset overcharges
 13 from loaded COI rates, took nothing in the litigation, putting them in the same position economically
 14 as they would have been had no case been brought. Thus, like in *Vogt*, the *Bally* court concluded
 15 that the fact that State Farm had charged less than it was authorized to in some instances did not
 16 affect the reliability of Mr. Witt’s damages model or create an intra-class conflict. *Bally*, 335 F.R.D.
 17 at 299-300, 303.

18 State Farm nevertheless argued that this cross-over phenomenon presented the prospect that
 19 some current policy owners would be harmed if State Farm *changed its rates* to match its mortality
 20 rates. The *Vogt* court rejected that argument because the lawsuit did not set rates going forward.
 21

22
 23 ⁵ Mr. Witt prepared a damages calculation that accommodated State Farm’s offset defense, Ex. 2 (*Vogt* Trial Tr.), 132:19-24, which the jury adopted by awarding the exact amount of damages reflected in that calculation. Likewise, in *Bally*, Mr. Witt similarly calculated a damages total that assumed State Farm’s offset defense was accepted. *See* Ex. 3 (Witt Trial Report in *Bally*), ¶ 10(e).

1 *Vogt*, 2018 WL 4937069, at *3, *aff’d* 963 F.3d at 767-68. And, where State Farm had already taken
2 the position that it could set rates up to the Policy’s maximum rates, the lawsuit benefited all class
3 members by lowering the ceiling of what State Farm was permitted to charge. *Id.* Plaintiff’s
4 interpretation, which merely requires State Farm to remove undisclosed, non-mortality loads from
5 COI rates, simply cannot harm any class member. Thus, the purported “cross-over” does not create
6 an intra-class conflict.

2. State Farm's contention that it "pooled" its mortality rates does not create an intra-class conflict.

Similarly, Plaintiff anticipates that State Farm will argue that Mr. Witt's use of unpooled mortality rates to calculate damages creates an intra-class conflict. At the *Vogt* trial, the key issue for the jury was determining what rates reflected State Farm's mortality expectations for the class. The plaintiff argued that State Farm should have used rates reflecting those mortality expectations as its COI rates because those rates were determined using only the factors listed in the Policy. State Farm identified its mortality rates in the actuarial memoranda for Form 94030. At initial pricing, these rates were identified as a percentage of the SF88-91 mortality rate table⁶—an “unpooled” mortality table—meaning the table assigns a different mortality risk depending on how long it has been since a given policy was issued. Witt Dec., ¶ 39.⁷ State Farm argued to the jury, however, that it had “pooled” the mortality rates shown in the SF88-91 before loading them with expenses and profits, and therefore, that damages should be determined using “pooled” mortality rates. A pooled rate table assigns the same mortality risk to each policy owner of the same age, sex, and rate class,

⁶ The SF88-91 is a table internal to State Farm and was used by State Farm to determine its “pricing” mortality for Form 94030.

⁷ The length of time elapsed since underwriting affects mortality risk because health conditions not present at the time of underwriting can develop. See Ex. 2 (*Vogt* Trial Tr.), 134:8-23.

1 regardless of how many years the policy has been held. *Id.* Using State Farm's litigation-created,
 2 pooled mortality estimate⁸ to calculate damages would have reduced the overall damages to the class
 3 by \$10,900,554.88. Ex. 2 (*Vogt* Trial Tr.), 132:21-23, 141:13-16. The jury rejected State Farm's
 4 contention that it pooled its mortality rates, and awarded damages using the unpooled mortality
 5 rates.⁹ See *Vogt*, 963 F.3d at 768 ("Although time and again throughout this appeal State Farm
 6 reaffirms its reluctance to accept the jury's finding on this point, the fact remains that the jury
 7 concluded State Farm did not pool its mortality rates and any argument premised on pooling must
 8 fail."); *Bally*, 335 F.R.D. at 299 ("When faced with this question of fact in *Vogt*, the jury found that
 9 State Farm used the unpooled mortality rates to calculate the ultimate COI charges.").

10 Thus, the theory on which the plaintiff proceeded and prevailed at trial (that State Farm's
 11 mortality rates were not "pooled") *maximized* total class damages. However, State Farm argued that
 12 some class members' damages would actually have been higher if plaintiff had used pooled mortality
 13 rates in the damages model, and therefore, that there was an intra-class conflict between those class
 14 members and the rest of the class. Plaintiff anticipates State Farm will make the same argument here,
 15 and again, it should be rejected.

16 First, in certifying the classes in *Vogt* and *Bally*, those courts found that the question whether
 17 State Farm pooled its mortality rates has a common answer for all class members. *Vogt*, 2018 WL
 18 1955425, at *4 (whether State Farm used a pooled mortality rate "will have a common answer for
 19 all of the members of the proposed class"); *Bally*, 335 F.R.D. at 300 (whether State Farm pooled its
 20
 21

22 ⁸ Notably, in *Vogt*, the plaintiff chose not to challenge State Farm's unreliable "pooled" table, as State Farm had
 provided no evidence (until jury-rejected trial testimony) of its use.

23 ⁹ Mr. Witt alternatively calculated a lost Account Value total that incorporated pooled mortality rates, Ex. 2 (*Vogt* Trial
 Tr.), 141:5-12, which the jury rejected by awarding the damages plaintiff requested using unpooled mortality rates (but
 providing State Farm an offset).

1 mortality rates “amounts to a factual dispute that does not create an intra-class conflict”). Thus, this
 2 common factual issue does not affect the propriety of class certification. *Id.*; *cf. Krueger v.*
 3 *Ameriprise Fin., Inc.*, 304 F.R.D. 559, 575 (D. Minn. 2014) (evidence and the law will determine
 4 when the breach occurred, “irrespective of the ‘preferred’ or ‘optimal’” date for any single class
 5 member). Second, State Farm never produced a mortality table containing pooled rates, and never
 6 produced credible evidence that it did in fact pool its mortality rates before loading them with
 7 expenses and profits. It would have been detrimental to all class members for the plaintiff to adopt
 8 State Farm’s unsupported position. Ex. 2 (*Vogt* Trial Tr.), 141:21-142:13. As the *Vogt* court found
 9 in later refusing to decertify the class, plaintiff “cannot be faulted for failing to argue a fact that was
 10 found untrue.” *Vogt*, 2018 WL 4937069, at *3. Third, State Farm is wrong that an intra-class conflict
 11 is created simply because class members may have differing preferences for how damages are
 12 calculated. *Vogt*, 963 F.3d at 768 (“[E]ven if there are slightly divergent theories that maximize
 13 damages for certain members of the class, ‘this slight divergence is greatly outweighed by shared
 14 interests in establishing [defendant’s] liability.’”) (quoting *DiFelice v. U.S. Airways, Inc.*, 235 F.R.D.
 15 70, 79 (E.D. Va. 2006); citing Newberg on Class Actions § 3:62 (5th ed.) (“Courts generally reject
 16 the argument that an intra-class conflict exists when divergent theories of liability would benefit
 17 different groups within the class,” including where “different class members desir[e] different
 18 methods of calculating damages.”)); *Blackie v. Barrack*, 524 F.2d 891, 909 (9th Cir. 1975) (“[T]he
 19 conflict [over the calculation of damages], if any, is peripheral, and substantially outweighed by the
 20 class members’ common interests.”).

21 Second, because the jury in *Vogt* found as a matter of fact that State Farm did *not* pool its
 22 mortality rates, Plaintiff will argue in this case, just as the plaintiff did in *Bally* (*see Bally*, Dkt. 142
 23 at ECF pages 17-19), that State Farm is precluded from arguing that it did pool its mortality rates.

In determining whether issue preclusion applies, the Court considers four factors: "(1) whether the issue decided in the prior adjudication was identical to the issue presented in the present action; (2) whether the prior adjudication resulted in a judgment on the merits; (3) whether the party against whom estoppel is asserted was a party or was in privity with a party to the prior adjudication; and (4) whether the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior suit." *James v. Paul*, 49 S.W.3d 678, 682 (Mo. 2001).¹⁰ Each of these factors applies here. The issue of whether State Farm is collaterally estopped from arguing it pooled its mortality rates need not be decided now, but it does provide further support for Plaintiff's argument that he is an adequate representative of the Class in supporting a damages model that uses unpooled mortality rates.

3. Mr. Witt's use of mortality rates "blended" for tobacco use does not create an intra-class conflict.

Plaintiff also anticipates State Farm will argue that Mr. Witt's calculation of damages using mortality rates that do not differentiate between tobacco users and non-users¹¹ creates an intra-class conflict, as it did in *Bally*. The *Bally* court rejected this argument, finding, like it did in rejecting State Farm's pooled mortality arguments, that whether State Farm's mortality rates were blended for tobacco use was a common question of fact appropriate for class certification. *Bally*, 335 F.R.D. at 300.

* * *

¹⁰ See *Daewoo Elecs. Am. Inc. v. Opta Corp.*, 875 F.3d 1241, 1244 (9th Cir. 2017) (“When it is necessary for a federal district court with diversity jurisdiction to determine the preclusive effect of a prior decision by a different federal district court sitting in diversity, the second court must apply preclusion principles according to the law of the initial court’s state.”).

¹¹ This means the mortality risk related to tobacco use is spread across all policy owners, or “blended.” Ex. 2 (*Vogt Trial Tr.*), 162:15-17, 206:5-8; Witt Dec., ¶ 38.

1 Thus, the Court should conclude that Plaintiff and his counsel satisfy the adequacy
 2 requirement, and therefore appoint Plaintiff as the Class Representative and his counsel as Class
 3 Counsel.

4 **V. Plaintiff Satisfies the Requirements of Rule 23(b)(3).**

5 **A. Predominance is satisfied.**

6 “The predominance inquiry tests whether proposed classes are sufficiently cohesive to
 7 warrant adjudication by representation.” *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045
 8 (2016). In assessing predominance, the court considers the “relation between common and individual
 9 questions in a case.” *Id.* “An individual question is one where members of a proposed class will need
 10 to present evidence that varies from member to member, while a common question is one where the
 11 same evidence will suffice for each member to make a *prima facie* showing [or] the issue is
 12 susceptible to generalized, class-wide proof.” *Id.* (internal quotations omitted). “The predominance
 13 inquiry asks whether the common, aggregation-enabling, issues in the case are more prevalent or
 14 important than the non-common, aggregation-defeating, individual issues.” *Id.* (internal quotations
 15 omitted). “When one or more of the central issues in the action are common to the class and can be
 16 said to predominate, the action may be considered proper under Rule 23(b)(3) even though other
 17 important matters will have to be tried separately, such as damages or some affirmative defenses
 18 peculiar to some individual class members.” *Id.* (internal quotations omitted).

19 **1. Liability is subject to class-wide determination.**

20 Because the Policy is a standardized, form contract, not subject to individual negotiation, the
 21 case is replete with common questions of law and fact that predominate over any individual
 22 questions. Courts routinely find that common issues predominate under these circumstances. *E.g.*,
 23 *Vogt*, 2018 WL 1955425, at *6 (“The major portion of the evidence on the claims for breach of

1 contract, conversion, and declaratory judgment is capable of consideration on a class wide basis.
 2 The terms of the Policy are the same for all class members. State Farm has not suggested that the
 3 determination of COI rates varied on a case-by-case basis. Thus, common questions predominate.”);
 4 *Bally*, 335 F.R.D. at 304 (finding predominance satisfied; rejecting State Farm’s argument that
 5 statute of limitations issues defeated predominance); *USAA COI*, 336 F.R.D. at 555 (finding
 6 predominance satisfied because the class policies were form policies that were subject to
 7 interpretation under a single state’s law, and the insurer’s performance was identical under each
 8 policy); *Phoenix COI*, 2013 WL 12224042, at *13 (predominance was satisfied because “[t]he
 9 insurance policies at issue contain provisions regarding how COI rates are set and what Phoenix can
 10 consider in making any changes in rates, and these terms are substantively identical for all the
 11 policies held by the members of the Classes”); *Transamerica COI*, 2017 WL 6496803, at *13
 12 (predominance satisfied because “Plaintiffs’ claims are premised on Transamerica’s uniform policy
 13 language and uniform conduct”); *Lincoln Life COI*, 330 F.R.D. at 382-83 (predominance satisfied
 14 where the “contract language does not vary by individual class member” and there are “no
 15 individualized issues with respect to defendants’ conduct towards members of the putative class”);
 16 *John Hancock COI*, 2017 WL 4284163, at *6-7.

17 **a. Common questions predominate Plaintiff’s breach of contract
 18 claims.**

19 The substantive elements of Plaintiff’s breach of contract claims require the same proof for
 20 each class member. To succeed on a breach of contract claim, the plaintiff must show: “(1) a valid
 21 agreement existed between the parties, the agreement was breached, and the plaintiff was damaged.”
 22 *Univ. of Washington v. Govt Employees Ins. Co.*, 404 P.3d 559, 566 (Wash. App. 2017). Each of
 23 these elements will be proven through the same evidence for each class member. This is precisely

1 what was proven in *Vogt*, culminating in a class-wide jury verdict, and for which the plaintiff in
 2 *Bally* has moved for summary judgment in favor of the California class.

3 Plaintiff's first breach of contract claim (Count I) requires the same proof for all class
 4 members. The Policy authorizes State Farm to use only the listed mortality factors when determining
 5 the COI rates used to calculate the COI charges that are deducted from Plaintiff's Account Value
 6 each month. Count I alleges that State Farm breached and continues to breach the Policy by loading
 7 COI rates with non-mortality factors, including without limitation, expense experience and profit
 8 considerations. Compl. ¶¶ 38-43, 58-65.

9 Common proof can be used to calculate COI rates that are, as required by the Policy, based
 10 on the mortality factors listed in the Policy, which can then be compared to the COI rates State Farm
 11 actually used for each policy owner to determine the amount of the non-mortality loads and resulting
 12 damages. *See* Witt Dec., ¶¶ 48-58. Because the same proof will determine State Farm's liability and
 13 class members' damages, common questions predominate over any individual questions.

14 Plaintiff's breach of contract claim brought under Count II likewise requires the same proof
 15 for all class members. The Policy authorizes State Farm to deduct a fixed amount for expenses each
 16 month. Count II alleges that State Farm breaches the Policy's fixed Expense charge provision by
 17 adding expense loads into its expected mortality to determine its COI rates, thereby imposing
 18 unauthorized expenses through its COI charges. Compl. ¶¶ 66-69. The same proof will be used for
 19 all class members to determine whether State Farm, does, in fact, include unauthorized expense loads
 20 in its COI charges. Because the same proof will determine State Farm's liability and class members'
 21 damages, common questions predominate over any individual questions.

b. Common questions predominate Plaintiff's conversion claim.

Because the Policy authorizes State Farm to deduct only certain amounts from policy owners' Account Values, when State Farm takes more money out of policy owners' Account Values than is authorized, it has the obligation to return those funds, and therefore has wrongfully converted them. *See, e.g., Consulting Overseas Mgmt., Ltd. v. Shtikel*, 18 P.3d 1144, 1147 (Wash. App. 2001) ("The tort of conversion is the act of willfully interfering with any chattel, without lawful justification, whereby any person entitled thereto is deprived of the possession of it. Money may become the subject of conversion . . . if that party [receiving it] had an obligation to return the money to the party claiming it.") (internal quotations and citations omitted). Accordingly, if Plaintiff succeeds on Counts I or II, he will succeed on Count III for the same reasons. *See Vogt*, 2018 WL 1955425, at *3 (certifying the plaintiff's conversion claim because like his breach of contract and declaratory judgment claims, it "turn[ed] on interpretation of the Policy, which is a standard form contract to which each putative class member was a party [and] . . . State Farm's determination of COI rates, which was uniform."); *Bally*, 335 F.R.D. at 301 (same). Thus, predominance is satisfied with respect to Plaintiff's conversion claim.

c. Common questions predominate Plaintiff's Washington Consumer Protection Act claim.

“The elements of a WCPA claim are (1) an unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) that impacts the public interest; (4) causes injury to the Plaintiffs’ business or property; and (5) involves a causal link between the practice and the injury.” *Reichert v. Keefe Commissary Network, L.L.C.*, 331 F.R.D. 541, 556 (W.D. Wash. 2019) (citing *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash. 2d 778, 780 (1986)). “Breach of a private contract may affect the public interest and, thus, be actionable under the CPA.” *Univ. of Wash.*, 404 P.3d at 567. There can be no dispute the first three elements will be resolved entirely through

1 common evidence as each considers State Farm's conduct, which was uniform as to each class
 2 member. *See Reichert*, 331 F.R.D. at 556.

3 Predominance is satisfied as to the final two elements, injury and causation, as well. First,
 4 even if some class members are found to not have suffered net overcharges because State Farm
 5 prevails on its offset defense, "the Ninth Circuit has recognized that injury is just one element of a
 6 WCPA claim that does not necessarily overwhelm the others." *Id.* (citing *Torres v. Mercer Canyons*
 7 Inc., 835 F.3d 1125, 1135 (9th Cir. 2016)). Accordingly, any differences in class member injuries
 8 would not defeat predominance. Likewise, because Plaintiff's "causation theory" is premised on
 9 State Farm's omission that it was including loads for profit and expense factors in its COI rates,
 10 Plaintiff and the class are entitled to "[a] presumption of reliance," and "common questions therefore
 11 predominate" regarding whether there is a causal link between State Farm's practice and each class
 12 member's injury. *Id.* Therefore, predominance is satisfied with respect to Plaintiff's WCPA claim.

13 **2. Damages can be determined on a class-wide basis.**

14 "[T]he overwhelming weight of authority holds that the need for individual damages
 15 calculations does not diminish the appropriateness of class action certification where common
 16 questions as to liability predominate." *Martin v. Johnson Controls Fire Prot., LP*, No. 2:19-CV-
 17 00514-RAJ, 2020 WL 4747849, at *4 (W.D. Wash. Aug. 17, 2020). "This is particularly true where
 18 damages can be computed according to some formula, statistical analysis, or other easy or essentially
 19 mechanical methods." *D.C. by & through Garter v. Cty. of San Diego*, No. 15CV1868-MMA (NLS),
 20 2017 WL 5177028, at *15 (S.D. Cal. Nov. 7, 2017) (internal quotations omitted). Here, Plaintiff's
 21 expert can mechanically determine damages for each class member, further supporting certification.

22 If Plaintiff establishes State Farm breached its standard form Policy (Counts I and II),
 23 converted class members' money (Count III), and/or engaged in unfair or deceptive trade practices

1 by omitting material information about State Farm's loading of COI rates (Count IV), each class
 2 member's claims would require only proof of damages.¹² The monetary harm to policy owners of
 3 State Farm's practice of loading undisclosed factors into COI rates, under Plaintiff's Counts I-IV,
 4 can be calculated in a straightforward way for each policy owner by comparing the COI rates State
 5 Farm actually used in determining COI charges with rates determined using only the factors listed
 6 in the Policy, and recalculating Account Values using the rates that do not include the undisclosed
 7 loads. Witt Dec., ¶¶ 48-58. This calculation can be performed using the policy-level data from
 8 administrative systems in place at State Farm. *Id.* ¶¶ 46-58. State Farm retains within its
 9 administrative systems a record of, and transaction information related to, premium payments,
 10 credited interest rates, policy loans, and policy charges, among other policy data. *Id.* Using this data,
 11 Account Values can be recalculated using alternate COI rates, while leaving unchanged the actual
 12 premium payments made, past investment experience, policy loans taken, and other policy charges.
 13 *Id.* ¶ 51. This is the same methodology Mr. Witt applied in *Vogt* and *Bally*.

14 Because State Farm maintains the data used in this methodology for every class member,
 15 this methodology does not require any class member to provide individual evidence. And, although
 16 the amount of losses for each policy owner may vary, because the same methodology and formulas
 17 are applied for each policy owner using State Farm's own policy owner data, calculating class-wide
 18 losses under this methodology is simply an administrative task capable of being performed on a
 19
 20
 21

22 ¹² In the *Vogt* case, after the district court certified the Missouri class, it granted partial summary judgment in favor of
 23 the class. *See Vogt*, Dkt. 335 at 1. The subsequent trial was limited to the determination of damages. *See id.* In *Bally*,
 the plaintiff has likewise moved for summary judgment in favor of the class, including on damages, relying in part on
 principles of collateral estoppel premised on the *Vogt* jury's factual determinations. *See Bally*, Dkt. 142 at ECF pages
 17-19.

1 class-wide basis.¹³ State Farm has produced policy-level data here, and Mr. Witt has calculated class-
 2 wide lost Account Values in the amount of \$16,304,618.86.¹⁴

3 In *Vogt and Bally*, State Farm challenged the reliability of Mr. Witt's damages model.
 4 Despite its arguments being repeatedly rejected, Plaintiff expects State Farm to make the same
 5 arguments here.¹⁵ These arguments should be rejected as a basis to deny class certification, for the
 6 reasons explained below.

7 **a. State Farm's offset affirmative defense premised on the cross-over**
8 does not affect the reliability of Plaintiff's damages model.

9 In *Vogt and Bally*, State Farm argued that the fact that Mr. Witt's model *could* produce an
 10 "undercharge" in some months indicates the model does not reliably measure the portion of the COI
 11 that was determined using unlisted factors. State Farm is wrong. Instead, the rare occurrence of the
 12 cross-over simply indicates that State Farm's COI rates occasionally did not include a load for
 13 unlisted factors. State Farm's contention that the cross-over phenomenon is increasing, even if true,
 14 is irrelevant to the reliability of Mr. Witt's damages model. It simply reinforces Plaintiff's point that

15 ¹³ In the event the Court disagrees that damages can be measured class-wide, Plaintiff requests that the Court certify
 16 the common legal and factual issues under Rule 23(c)(4). See *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234
 17 (9th Cir. 1996) ("Even if the common questions do not predominate over the individual questions so that class
 18 certification of the entire action is warranted, Rule 23 authorizes the district court in appropriate cases to isolate the
 19 common issues under Rule 23(c)(4)(A) and proceed with class treatment of these particular issues."). "Thus, for
 20 example, Rule 23(c)(4) may be used 'to separate the issue of liability from damages.'" *Tasion Commc'nns, Inc. v.*
Ubiquiti Networks, Inc., 308 F.R.D. 630, 632 (N.D. Cal. 2015) (quoting *In re Nassau County Strip Search Cases*, 461
 21 F.3d 219, 226 (2d Cir. 2006)).

22 ¹⁴ The aggregate lost Account Values calculated by Mr. Witt currently includes calculations for policy owners who are
 23 or will ultimately be excluded from the Class, either because they exclude themselves during the opt-out period, or
 24 because they are, for example, State Farm employees who have not yet been identified as such by State Farm. See Witt
 25 Dec., ¶ 10(d) n.2.

26 ¹⁵ "[C]ourts have struck a balance by applying *Daubert* at the class certification stage, but doing so in a manner that
 27 recognizes the specific criteria under consideration, as well as the differing stage of discovery and state of the evidence."
Moussouris v. Microsoft Corp., 311 F. Supp. 3d 1223, 1235 (W.D. Wash. 2018). Plaintiff contends that each of State
 28 Farm's challenges to the reliability of Mr. Witt's damages model goes to the merits of whether the model correctly
 29 measures damages, not the Rule 23 question of whether it is capable of measuring damages on a class-wide basis.
 Plaintiff nevertheless addresses these issues here to provide the Court context to these arguments.

1 State Farm's actual COI rates are not in step with its mortality rates, which are increasing as each
 2 policy owner ages. “[T]hat State Farm recoups profits and expenses in the earlier years of the Policy
 3 and refrains from doing so later—when more policies have lapsed or been surrendered, and when
 4 actual mortality costs increase—does not indicate a flaw in the damages model; instead, it more
 5 likely indicates a calculated business decision.” *Vogt*, 2018 WL 4937330, at *5; *Bally*, 335 F.R.D.
 6 at 300 (same).

7 **b. Calculating damages for policy owners who selected “Death
 Benefit Option 1” and for whom a death benefit was paid does not
 affect the reliability of Plaintiff’s damages model.**

8 State Farm also argued in *Vogt* and *Bally* that Mr. Witt’s damages model was unreliable
 9 because it calculates a lost Account Value for class members who selected Death Benefit Option 1
 10 when they purchased their policies and were subsequently paid a death benefit. Upon death, a policy
 11 owner who selected Death Benefit Option 1 is entitled to the face amount of their policy, not the
 12 amount in the Account Value. State Farm thus argued that these class members should not have been
 13 awarded damages. However, as the district court and Eighth Circuit concluded in *Vogt*, because State
 14 Farm deducted COI charges that included undisclosed loads from these policy owners’ Account
 15 Values during their lives, Mr. Witt’s damages model accurately calculates the amount of their
 16 damages. See *Vogt*, 963 F.3d at 770. Plaintiff’s calculation of these class members’ lost Account
 17 Values provides “the most reasonable basis for measuring the harm that was incurred during the life
 18 of the policyholders.” *Id.* In any event, their presence in the Class does not impact the propriety of
 19 class certification because they are an identifiable group. See *Bally*, 335 F.R.D. at 300; *Vogt*, 2018
 20 WL 4937330, at *6.

21 **c. Mr. Witt’s consideration of class members’ tobacco use is
 reasonable.**

22 In *Vogt* and *Bally*, State Farm argued that Mr. Witt’s model improperly ignored the effects

1 of class members' tobacco use. Those courts rejected that argument. Mr. Witt's damages
 2 methodology factors in tobacco use on a "blended" basis. Ex. 2 (*Vogt* Trial Tr.), 152:19-23, 205:24-
 3 206:8. He used mortality rates blended for tobacco/non-tobacco use because State Farm's pricing
 4 mortality rates—the rates that State Farm said measured its mortality expectations (*see id.* at 111:10-
 5 112:13, 113:16-114:7, 115:3-22, 120:11-121:3, Witt Dec., Ex. G (N.J. Actuarial Memo.) at 5)—
 6 accounted for tobacco use on a blended basis. Ex. 2 (*Vogt* Trial Tr.), 153:1-6, 155:4-14, 158:13-
 7 159:12. Therefore, Mr. Witt's use of the rates State Farm itself says reflected its mortality
 8 expectations properly measures harm to class members caused by State Farm's failure to use
 9 mortality-only rates.¹⁶ *See Vogt*, 2018 WL 4937330, at *5 (rejecting State Farm's argument that Mr.
 10 Witt's model was deficient because it factored in tobacco use on a blended basis because there was
 11 no dispute State Farm's mortality expectations factored in tobacco use on a blended basis), *aff'd*,
 12 963 F.3d at 769 (concluding "there was no need for the damages models to take [tobacco-use] into
 13 account as this was not a mortality factor listed in the policy"); *Bally*, 335 F.R.D. at 299 (same).¹⁷
 14 Thus, State Farm's arguments in opposition to class certification premised on Mr. Witt's use of
 15 mortality rates undifferentiated by tobacco status to calculate damages should be rejected.

16 **3. Class members' subjective understandings of the Policy's terms do not
 17 create individualized issues.**

18 State Farm will also likely contend, as it did in *Bally*, that each class member's subjective
 19 understanding of the Policy's terms is relevant to its interpretation, and therefore, whether State
 20

21 ¹⁶ Were the Court to rule that Plaintiff's damages model must apply different mortality assumptions for tobacco users
 22 and non-users, Mr. Witt can adjust the mortality rates in the model accordingly. Witt Dec., ¶ 40.

23 ¹⁷ Likewise, for the reasons explained in Part IV(D)(2), *supra*, Mr. Witt's use of State Farm's unpooled pricing mortality
 24 rates is appropriate. Furthermore, just as on the issue of mortality-pooling, Plaintiff will argue that State Farm is
 25 collaterally estopped from arguing that its mortality-only rates were differentiated for tobacco use because the jury in
Vogt necessarily found that they were not. *See Bally*, Dkt. 142 at ECF page 19.

1 Farm breached the Policy. *See Bally*, 335 F.R.D. at 301. In other words, it is State Farm’s contention
 2 that the Policy could have different meanings for different policy owners.¹⁸ Not only would this be
 3 an absurd outcome where State Farm has acted uniformly as to all class members in its performance
 4 of its form Policy, it is also legally incorrect. While certain types of extrinsic evidence related to the
 5 intent of the parties is admissible under Washington law to resolve an ambiguous insurance policy
 6 provision, “[u]nilateral or subjective purposes and intentions about the meanings of what is written
 7 do not constitute evidence of the parties’ intentions.” *Lynott v. Nat'l Union Fire Ins. Co. of
 Pittsburgh, Pa.*, 871 P.2d 146, 149 (Wash. 1994). Rather, relevant extrinsic evidence is that which
 9 shows “an objectively manifested mutual intent[ion]” regarding the meaning of the policy. *Id.* And,
 10 where there are no “actual negotiations” over the policy’s contents, there is no such “objectively
 11 manifested mutual intent[ion]” and therefore, no relevant extrinsic evidence with which to resolve
 12 an ambiguity. *See id.; see also Spratt v. Crusader Ins. Co.*, 37 P.3d 1269, 1272-73 (Wash. App.
 13 2002) (stating “[u]sually the terms of insurance policies are not negotiated,” and only if they were
 14 is “extrinsic evidence . . . admissible to show the parties’ mutual intentions as manifested in the
 15 terms”); *Teck Metals, Ltd. v. Certain Underwriters at Lloyd’s, London*, 735 F. Supp. 2d 1246, 1253
 16 (E.D. Wash. 2010) (where an insurance policy was not negotiated, expressing doubt that “separate
 17 subjective understandings by each party as to [a policy term], even if the understandings are the
 18 same, would constitute relevant extrinsic evidence of an objective manifestation of mutual intent by
 19 the parties as to the meaning of the term”). “[L]eft with ambiguity in a nonnegotiated standard form
 20 insurance provision[,]” the “[u]nresolved ambiguity in insurance contract language is resolved

21
 22
 23 ¹⁸ On June 1, 2020, Plaintiff served discovery on State Farm requesting documents and information regarding any statements by State Farm or its agents to policy owners informing them how the COI rates were determined. As of this filing, State Farm has produced no documents or information responsive to these requests. *See Siegel Decl.*, ¶ 8.

1 against the insurer.” *Queen City Farms, Inc. v. Cent. Nat. Ins. Co. of Omaha*, 882 P.2d 703, 721
 2 (Wash. 1994).

3 Applying similar policy interpretation standards, the *Bally* court rejected State Farm’s
 4 contention that the interpretation of the Policy could vary because policy owners received different
 5 agent sales pitches about the Policy, thus defeating class certification. 335 F.R.D. at 301-02. The
 6 court concluded that State Farm’s contention that “its agents bind it to thousands of individual
 7 contracts that, despite the use of a standard form, all consist of materially different terms based on
 8 unwritten representations that each agent makes to a purchaser . . . runs counter to an axiom of
 9 contract law, that when there is a standardized agreement like the form contract at issue in this case,
 10 the agreement ‘is interpreted wherever reasonable as treating alike all those similarly situated,
 11 without regard to their knowledge or understanding of the standard terms of the writing.’” *Id.* at 302
 12 (quoting Restatement (Second) of Contracts § 211(2)); *USAA COI*, 336 F.R.D. at 555 (same). The
 13 *Bally* court likewise noted that State Farm’s argument that its Policy could have thousands of
 14 different meanings depending on “unwritten representations that each agent makes to a purchaser”
 15 ran “counter to language in the Policy stating that ‘[o]nly an officer has the right to change this
 16 policy. No agent has the authority to change the policy or waive any of its terms.’” *Id.* at 302 & n.4
 17 (quoting the Policy at 11).

18 So too here. Because under Washington law the subjective understanding of each class
 19 member as to the meaning of the Policy’s COI rates provision is not admissible to resolve any
 20 ambiguity in the Policy, these subjective understandings do not create individualized issues that
 21 defeat predominance. Likewise, because the Policy itself explicitly and unambiguously prevents an
 22 agent’s statements to a policy owner from having any effect on the meaning of the Policy, what an
 23 agent may have told a prospective insured, even if otherwise admissible under Washington law,

1 could have no bearing on the interpretation of the Policy. Accordingly, class members' subjective
 2 understandings of the meaning of the Policy does not create individualized issues of policy
 3 interpretation.

4 **4. State Farm's statute of limitations defense does not create individualized
 issues.**

5 The *Vogt* and *Bally* courts both rejected State Farm's argument that individualized issues
 6 related to the statute of limitations defeated predominance. *Vogt*, 2018 WL 1955425, at *6, *aff'd*,
 7 963 F.3d at 765-66; *Bally*, 335 F.R.D. at 304. Both courts concluded that there was no evidence
 8 indicating any policy owners knew or should have known State Farm was considering undisclosed
 9 factors in its determination of COI rates to result in the accrual of their claims, and thus, ““there
 10 [was] nothing to indicate that individual statute-of-limitations issues would predominate so as to
 11 make class certification impractical or inappropriate.”” *Bally*, 335 F.R.D. at 304 (quoting *Vogt*, 2018
 12 WL 1955425, at *6).

13 Like Missouri and California, Washington applies the discovery rule to prevent the accrual
 14 of a plaintiff's claims where the plaintiff did not know, or in the exercise of due diligence would not
 15 have learned, of the other party's breach. *See Wm. Dickson Co. v. Pierce Cty.*, 116 P.3d 409, 414
 16 (Wash. App. 2005). And, like the plaintiffs in *Vogt* and *Bally*, Plaintiff will demonstrate that the
 17 statute of limitations has not run on his claims or those of the Class because no class member had
 18 any way of knowing how State Farm determined the Policy's COI rates. Plaintiff's claims for relief
 19 and tolling allegations are not premised on any individualized evidence of statements from his
 20 insurance agent, State Farm, or anyone else. Instead, his claims are premised on uniform contract
 21 language and State Farm's uniform conduct. *See, e.g., Schramm v. JPMorgan Chase Bank, N.A.*,
 22 No. LA CV09-09442 JAK, 2011 WL 5034663, at *10, 11-12 (C.D. Cal. Oct. 19, 2011) (holding that
 23 a statute of limitations defense did not necessitate individual inquiries into when class members had

1 actual or inquiry notice of their claims when their application depends on common evidence of the
 2 defendant's conduct and noting that defendant's "speculation that some class members' claims may
 3 be barred on the basis of actual knowledge is not sufficient to defeat certification") (citing *Cameron*
 4 *v. E.M. Adams & Co.*, 547 F.2d 473 (9th Cir. 1976); *Williams v. Sinclair*, 529 F.2d 1383, 1388 (9th
 5 Cir. 1975)). The same evidence will prove the claims and tolling allegations of the Class as a whole.
 6 Thus, State Farm's statute of limitations defense does not undermine the predominance of the
 7 common issues.

8 **B. Superiority is satisfied.**

9 Finally, Rule 23(b)(3) requires that a class action be superior to other methods of
 10 adjudication, an analysis that "encompasses the whole range of practical problems that may render
 11 the class action format inappropriate for a particular suit." *Eisen v. Carlisle & Jacqueline*, 417 U.S.
 12 156, 164 (1974). In determining whether superiority is satisfied, a court considers: "(A) the class
 13 members' interests in individually controlling the prosecution or defense of separate actions; (B) the
 14 extent and nature of any litigation concerning the controversy already begun by or against class
 15 members; (C) the desirability or undesirability of concentrating the litigation of the claims in the
 16 particular forum; and (D) the likely difficulties in managing a class action." Rule 23(b)(3).

17 Because this case involves a form contract and uniform Washington law governing its
 18 interpretation, a class action will be just as manageable as a single plaintiff case. There are no other
 19 class actions pending against State Farm making the claims asserted here on behalf of a Washington
 20 class. In addition, because all class members' policies were issued in Washington, concentrating this
 21 litigation in Washington is desirable. Class certification will greatly benefit the many policy owners,
 22 all of whom are in the dark about how State Farm calculates COI charges because State Farm never
 23 discloses its COI rates or the factors it uses to determine them, and all have an interest in securing

1 the just adjudication of their rights as against State Farm. *See Bally*, 335 F.R.D. at 305; *Vogt*, 2018
 2 WL 1955425, at *7 (both finding superiority satisfied).

3 **V. Rule 23(b)(2) Is Satisfied.**

4 With respect to Plaintiff's claim for declaratory judgment and injunctive relief at Count V,
 5 the proposed Class satisfies Rule 23(b)(2) because State Farm "has acted or refused to act on grounds
 6 that apply generally to the class, so that final injunctive or corresponding declaratory relief is
 7 appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Determination of the merits
 8 of Count V will turn on the same evidence supporting Counts I and II. As such, certification of Count
 9 V under Rule 23(b)(2) is appropriate. *See Vogt*, 2018 WL 1955425, at *7 (certifying the plaintiff's
 10 declaratory judgment claim under 23(b)(2) for purposes of interpreting the Policy because "the terms
 11 of the Policy are the same for all potential class members, [and therefore] the interpretation will
 12 result in one declaratory judgment applicable to all class members"); *Bally*, 335 F.R.D. at 305 (same,
 13 stating: "The terms of Form 94030 are the same for all prospective Class members, so an injunction
 14 or declaration relating to the contract terms will be uniform."); *see also In re Conseco*, 2005 WL
 15 5678842, at *1, *8-9 (certifying Rule 23(b)(2) class in nearly identical case); *In re Conseco*, 270
 16 F.R.D. at 532 (same); *see also Gooch v. Life Investors Ins. Co. of Am.*, 264 F.R.D. 340, 350 (M.D.
 17 Tenn. 2009), *aff'd* 672 F.3d 402, 427-28 (6th Cir. 2012) (certifying Rule 23(b)(2) class involving
 18 construction of rights under health insurance policies); *Leszczynski v. Allianz Ins.*, 176 F.R.D. 659,
 19 673-74 (S.D. Fla. 1997) (certifying Rule 23(b)(2) class that sought declaration of rights under
 20 insurance policies).

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